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Supreme Court, U.S.
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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

JOSEPH F. NASCIMENTO,

Petitioner,

v.

STATE BAR OF MONTANA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR A WRIT OF CERTIORARI

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82

QUESTIONS PRESENTED FOR REVIEW

1. Whether persons serving as the prosecutor and magistrate can be paid on a contingent fee in an attorney disciplinary proceeding, thereby giving the prosecutor and magistrate a direct financial interest in insuring discipline for the attorney.

2. Whether when and to what extent may a Commission On Practice deny an attorney's First Amendment rights to speak up to defend himself against false charges where he has never been given a trial. To what extent may an attorney's rights to petition elected officials and inform the public of actions of state officials be denied.

3. Whether when and to what extent an attorney's fourteenth amendment due process and equal protection rights can be suspended by the state.

4. Whether Due Process allows for a public hearing and trial when a complainant has taken a dual approach in attacking an attorney by filing an ethical complaint with the commission on practice and an identical civil action against that same attorney. If and when the standard of guilty until proven innocent can apply; when and if an attorney can be denied a trial. At what point if any, are the actions of the Commission so violative of constitutional principles as to allow an Attorney to petition the Federal District Courts for relief and what relief if any may be granted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL AND RULE PROVISIONS AT ISSUE 2

PERSONAL HISTORY OF PETITIONER 8

STATEMENT OF FACTS 9

PRELIMINARY HEARING 11

AT PRELIMINARY HEARING SPECIAL COUNSEL'S CLOSING CONSISTED OF A JOKE 12

WITNESSES WHO TESTIFIED ON PETITIONER'S BEHALF 13

PETITIONER WAS SUED BY COMPLAINANT MS. JAMES 14

Extortion 14

Threatening Communications 15

Blackmail 15

RETALIATION 16

ARGUMENT 17

VAGUE AND OVERBROAD 18

PETITIONER RELIED UPON 19

Meritorious Claims and Contentions 22

Case law in support of Petitioner 22

TABLE OF CONTENTS – Continued

Page

STANDARDS USED TO DETERMINE FRIVOLOUSNESS 23

FAIR TRIAL 25

CIVIL RIGHTS 26

REASONS FOR GRANTING CERTIORARI 27

ATTORNEY DISCIPLINE 27

EQUITABLE CONSIDERATIONS 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Avirgan v. Hall, 932 F.2d 1572 (January 13, 1992, *cert. denied*) 13

Bird v. Rothman, 627 P.2d 1097 (Ariz. App. 1981), 454 U.S. 865 (1981) 23

Bluestein v. State Bar, 13 Cal. 3d 162, 118 Cal. Rptr. 175, P.2d 12

Butterworth v. Smith, 110 S.Ct. 1376 (1990) 24

Cincinnati Bar Ass'n v. Gebhart, 431 N.E. 2d 1031 (Ohio 1982) 12

Florida Bar v. Agar, 394 So.2d 405 (Fla. 1980) 12

Gentille v. Nevada, 111 S.Ct. 2720 18

Hafer v. Mello, 112 S.Ct. 358 (1991) 26

Holladay v. St., 506 F.Supp. 1317, 38 St 26

In re Carstensen, 167M 321, 539 P.2d 387 (1975) 13

In re Charles, 290 Or. 127, 618 P.2d 1282 (1980) 12

In re Chris Fairbanks Dennis, United States Bankruptcy Court For The District Of Montana, 7 Montana Bankruptcy Reports (December 15, 1988) pg. 115-120 16

In Re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226 (1968) 17

Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312 (1951) 24

Mills v. Alabama, 384 U.S. 214 (1966) 25

North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E. 2d 396 (1981) 12

TABLE OF AUTHORITIES – Continued

Page

Papachristou v. City of Jacksonville, USCC 1972 24

Perez v. United States, 402 U.S. 146 (1971) 14

Sommer v. Carr, 299 N.W. 2d 856 (Wis. 1981) 22

State v. State Farm Fire and Casualty Co., 302 N.W. 2d 827, 100 Wis. 2d 583 (1981) 22, 23

Tower Special Facilities, Inc. v. Investment Club., 311 N.W. 2d 255, 104 Wis. 2d 211 (1981) 22

U.S. v. Holder, D.C. Mont. 1969, 302 F. Supp. 296, affirmed, 427 F.2d ___ 14

U.S. v. Le Vison, C.A. Alaska 1969, 418 F.2d 624 15

U.S. v. Pennell, D.C. Cal. 1956, 144 F. Supp. 317 ..14, 15

U.S. v. Ring, C.A. Tenn., 1975 F.2d 1001 15

U.S. v. Zouras, C.A. Ill. 1974, 497 F.2d 1115 12

Wimberly v. Rogers, 557 F.2d 671 (9th Cir. 1977) 26

Wrong v. Tabor, 422 N.E. 2d 1279 (Ins. App. 1981) 22

STATUTES

18 U.S.C.A. Section 873 15

18 U.S.C.A. Section 875 (d) 14

18 U.S.C.A. Section 876 15

42 U.S.C.A. Section 1983 (1976) 26

MONTANA CODE ANNOTATED

M.C.A. Montana Justice Courts Rules of Civil Procedure, Rule 7(A)(B)(C) 7

TABLE OF AUTHORITIES – Continued

Page

M.C.A. Montana Justice Courts Rules of Civil Procedure, Rule 10(A)(B) 8

MONTANA RULES OF PROFESSIONAL CONDUCT

RULE 1.6 Confidentiality of Information 5, 19

RULE 3.1 Meritorious Claims and Contentions 7

RULE 7 Grounds for Disciplining 3

RULE 10 Immunity 4

RULE 13 Access to Disciplinary Information 5, 18

RULE 15(c) Rules for Lawyer Disciplinary Enforcement 17

OTHER AUTHORITIES

V. I *The Law Of Lawyering:* (First Edition) A Handbook on the Model Rules of Professional Conduct/Geoffrey C. Hazard, Jr., W. William Hodes, Prentice Hall Law and Business, c1990, pp. 103, 598 .....19, 20

V. I *The Law of Lawyering:* (Second Edition) A Handbook on the Model Rules of Professional Conduct/Geoffrey C. Hazard, Jr., W. William Hodes, Prentice Hall Law and Business, c1992, pp. 174-176 21

American Bar Association, The Judicial Role in Lawyer Discipline, *American Bar Association Standing Committee on Professional Discipline and Center for Professional Responsibility,* July 1983, pp. 106-108 22

TABLE OF AUTHORITIES – Continued

Page

Lawyer's Deskbook & Directory 1990-1991 State Bar of Montana p. 202 19

Rule 503, Mont. R. Evid..... 4

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OPINIONS BELOW

The opinion of the Montana Supreme Court, addressing and rejecting Nascimento's federal constitutional challenges, is listed in the Appendix.[1]

[1] Although Petitioner has received a public reprimand, has been ordered to pay $5097.65 to the Commission and Complainant there's been no published reporter cite on this case. In fact this case is not even in the State Law Library.

JURISDICTION OF THIS COURT

The judgment below was entered and filed on November 20, 1991. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. section 1257, because petitioner raised and preserved, and the highest court of the state specifically rejected, all constitutional claims.

CONSTITUTIONAL AND RULE PROVISIONS AT ISSUE

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of the press, or the right to the people peaceable to assemble, and *to petition the Government for a redress of grievances*.

AMENDMENT V

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken, for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Petitioner has been publicly disciplined and fined over $5,000.00 with *no trial* for violating:

In pertinent part, the Montana Supreme Court Rules of Professional Conduct listed below:

RULE 7. GROUNDS FOR DISCIPLINE

Discipline may be imposed for any of the following reasons:

(a) Acts or omissions by a lawyer, individually or in concert with any other person or persons, which violate the canons of professional ethics and/or disciplinary rules adopted from time to time by the Supreme Court;

(b) Any act committed by an attorney contrary to the highest standards of honesty, justice or morality, including but not limited to, those outlined in parts 3 and 4 of Title 37, Montana Code Annotated, whether committed in such attorney's capacity as an attorney or otherwise;

(c) Conduct which results in conviction of a crime as defined in Rule 16.

(d) conduct which results in lawyer discipline in another jurisdiction;

(e) Violation of any discipline or disciplinary rule or order;

(f) Failure to respond to an inquiry from a grievance committee, investigator or the Commission, or failure to assert the ground for refusing to do so.

Acquittal of a charge of crime shall not necessarily constitute a bar to lawyer discipline for that act, nor shall conviction in a criminal proceeding by a condition precedent to the institution of disciplinary proceedings for that act.

RULE 10. IMMUNITY

A. From Civil Suit. Communications or complaints, oral or written to the Commission, grievance committee, special counsel or investigators acting for the Commission or a grievance committee, and testimony given in the proceedings are privileged, and no evidence thereof is admissible in a lawsuit against any complainant or witness. Waiver, if any of such privilege by voluntary disclosure by a complainant or witness shall be determined under Rule 503,[2] Mont. R. Evid. Members of the

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[2] **Rule 503. Waiver of privilege by voluntary disclosure.**

(a) General rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his

(Continued on following page)

Commission, investigators, members of grievance committees, special counsel, and staff members shall be immune from suit for any conduct in the course of their official duties. All of said persons are deemed officers and/or agents of the Court for all purposes mentioned in these rules.

RULE 13. ACCESS TO DISCIPLINARY INFORMATION.

A. Confidentiality. All disciplinary proceedings which are prior in time to the filing of a formal complaint with the Clerk of the Supreme Court and service upon the respondent as provided in Rule 11 (A) of these rules, and all documents in connection therewith shall be confidential.

B. Public Proceedings. Upon the filing and service of a formal complaint with the Clerk of the Supreme Court in a disciplinary matter, or upon the filing with the Clerk of the Supreme Court of a petition for reinstatement, the proceedings before the Commission shall be public except for:

(Continued from previous page)

predecessor while the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Joint holders. Where two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.

(1) deliberations of the Commission;

(2) information or proceedings with respect to which the Commission or Supreme Court has issued a protective order.

C. Violation. Violation by any person of any confidential information under these rules shall be punishable as a contempt of the Supreme Court.

D. Duty of Participants. All participants in a proceeding under these rules shall conduct themselves so as to maintain the confidentiality mandated by this rule.[3]

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; ***or to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,***

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[3] Complainant waived the confidentiality by suing Petitioner.

or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, *which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a* criminal proceeding, *or the respondent in a proceeding* that could result in incarceration, may nevertheless so *defend the proceeding as to require that every element of the case be established.*

MONTANA CODE ANNOTATED, 1989

MONTANA JUSTICE COURTS
RULES OF CIVIL PROCEDURE

III. Pleadings and Motions

Rule 7. Pleadings allowed. In justice court there may be a complaint, answer and counterclaim. * * *

A. COMPLAINT. * * * upon which the action is based.

B. ANSWER. The answer may contain a general denial of any or all of the material facts stated in the complaint which the defendant believes to be untrue and also a statement * * * of any other facts containing a defense or counterclaim upon which an action might be brought by the defendant against the plaintiff * * *

C. COUNTERCLAIM. A defendant may file * * * with his answer as a counterclaim * * * must be stated or the defendant waives his right to maintain an action for it against the plaitiff at a later time.

IV. Parties

Rule 10. Naming of parties to action. A. Actions shall be prosecuted or defended in the name of the person who has or will benefit from or be responsible * * * Such person shall be considered the real party in interest.

* * *

B. AMENDMENT, DISMISSAL. No action shall be dismissed for the reason that the real party in interest is not named in the pleadings * * *

A dismissal for failure to name the real party in interest shall be without prejudice.

PERSONAL HISTORY OF PETITIONER

Petitioner is a married man with a wife and one minor child. Petitioner has never been charged with a criminal or ethical violation in his life.[4]

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[4] Petitioner has a Bachelor of Business Administration, Masters in Business Administration, Juris Doctor of Law, has taught Business Law and Paralegal Studies at the University level. Petitioner has worked 60-70 hrs per week to build his reputation and practice. Petitioner is a sole practioner.

STATEMENT OF FACTS

Petitioner entered into an agreement to represent Complainant Elmira James in obtaining an uncontested divorce. Complainant for a two-three week period prior to this called Petitioner repeatedly claiming; she was old, broke and needed legal assistance. James was informed that if the divorce became contested then Petitioner would bill her at his regular $80.00 rate. The divorce immediately became contested. James came in to see Petitioner at 1:00 p.m. for her 4:00 p.m. appointment. Petitioner was not in his office at this time. Complainant James proceeded to sue Petitioner and file a complainant against Petitioner with the Commission on Practice.[5]

Complainant repeatedly called Petitioner stating that she had been sent to set Petitioner up, was paid to file her complaint against him. That the Commission had aided her in her dual attack upon Petitioner. That the attorney who initially put James up to this was located across the street from Petitioner's office.

Petitioner read the rules of professional conduct, conferred with other attorneys, and judges and began his defense.

Petitioner answered the complaint before the Commission, answered, counter-claimed, and began discovery

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[5] The Commission is an administrative arm of the Montana Supreme Court. The Commission has no judicial authority. It is charged with enforcement of Attorney Ethics. Montana adopted the American Bar Association Model Rules of Professional Conduct in 1984. At times in this brief special counsel and the Commission will be referred to as the Commission.

in the civil action filed against him by Complainant James.[6]

Petitioner has been denied discovery, a public hearing on the disciplinary charges against him. Petitioner has been denied a trial on the civil action against him. The Commission decided both the civil case and the ethical case on their own. PETITIONER HAS RECEIVED NO TRIAL or fair opportunity to defend himself.

Both Petitioner and his family have been threatened by the Commission in an attempt to silence them and to prevent them from obtaining a trial on these issues and speaking out.[7] After Petitioner answered, counterclaimed, and began discovery, the Commission sent Petitioner a letter stating he violated the ethical rules mentioned above.

Petitioner was also ordered to remove court documents by the Commission. Next Special Counsel came to Petitioner's office stating on numerous occasions "I DON'T WANT TO HEAR THIS SHIT" and "I DON'T

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[6] The only dealing's Petitioner has had with the Commission was when an Attorney located across the street from Petitioner had his client file a complaint with the Commission against Petitioner. This was done as a defense strategy to force Petitioner to drop his client(s) claim. These charges were later dropped after a lengthy investigation by the Commission.

[7] Had Petitioner not begun defensive civil action, a default would have been taken against him. In Montana by statute had Petitioner not defended, counter claimed, and begin discovery Res Judicata principles would have applied. The Commission has no Judicial Authority.

WANT TO HEAR THIS CRAP"[8] when Petitioner attempted to explain his position.

PRELIMINARY HEARING

The only witness to testify against Petitioner was the Complainant Elmira James, who committed perjury both at the preliminary hearing, and while obtaining her divorce.[9] Complainant James also admitted to committing social security fraud. This preliminary hearing was a sham.[10]

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[8] Petitioner apologizes for the language in his brief. But their is no other way to demonstrate the Commission action in this case. Petitioner personally draws the line when Commission members and their friends are allowed to come into Petitioner's office and repeatedly shout "I don't want to hear any of this shit" and "I don't want to hear any of this crap", threaten the Petitioner and his family, deny Petitioner the right to a public trial all in an attempt to suppress defense of litigation filed against him. Petitioner and his family are tired of being threatened and denied their constitutional rights.

[9] The Commission has shown a total disregard for their own procedural rules and the ethical rules that they claim to enforce. Their case against Petitioner is based on perjury.

[10] The Petitioner was ordered to appear in the conference room and to bring his witnesses for what I will call a preliminary hearing. Special Council brought his witness, Complainant James. The Members of the Commission were present at this preliminary hearing. The hearing was little more than a sham. Upon arriving at the hearing I had to request a space to place my defense materials. At the conference table, Special Council and Members of the Commission shook hands, semi-embraced, hugged, patted each other on the back, and exchanged compliments. During the breaks, Members of the

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Both Special Counsel and the Commission have shown a total disregard for the ethical standards they claim to enforce.

Cincinnati Bar Ass'n v. Gebhart, 431 N.E.2d 1031 (Ohio 1982); *Florida Bar v. Agar*, 394 So.2d 405 (Fla. 1980); *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981); *Bluestein v. State Bar*, 13 Cal. 3d 162, 118 Cal. Rptr. 175, 529 P.2d 599 (1975); *In re Charles*, 290 Or. 127, 618 P.2d 1282 (1980).

The Commission's main objective is to ensure they are paid, while teaching Petitioner a lesson. Never challenge the Commission or their friends, clearly unconstitutional and illegal conduct. *U.S. v. Zouras*, CA. Ill. (1974), 497 F.2d 1115.

AT PRELIMINARY HEARING SPECIAL COUNSEL'S CLOSING CONSISTED OF A JOKE

Upon closing Special Counsel was asked by Chairman Brown, "Do you have anything further to put on". Special Counsel responded with a joke. . . . "Four rules of

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Commission socialized, talking about various subjects such as dinner and drinks, whether they were all staying at the same hotel, and if their wives were with them. In the parking lot, Petitioner watched the Complainant drive Special Council away in the same direction as the hotel where Commission Members were staying. Although Petitioner filed his answer and Exhibits in a timely manner, the Commission Members admitted to never reading them. This preliminary hearing was held behind closed doors where the public had no notice of it.

defending a criminal case. . . . Number one, collect your fee in advance; Number two, let the grass grow green over the deceased; and Number three, try everyone in the courtroom except for the defendant; and Number four, collect your fee in advance. We have seen three of those four rules here today." (Tr. 194) This joke was totally inappropriate except to point out that the whole process including the false charges against Petitioner were a total farce, joke and a sham. *In re Carstensen*, 167 M 321, 539 P.2d 387 (1975). Sanctions to compensate Petitioner should be awarded in this case. *Avirgan v. Hull*, 932 F.2d 1572, 1581-1582 (January 13, 1992, *cert. denied*).

WITNESSES WHO TESTIFIED ON PETITIONER'S BEHALF

Testifying on Petitioner's behalf were the Attorney General Mark Racicot, Senior District Judge Thomas Honzel, Judge Dennis Julio, Attorneys David N. Niklas, Dennis Loveless, Petitioner and Kathy Nascimento.

All attorneys and judges stated that they were of the opinion that they knew of no constitutional prohibition against answering, counterclaiming and beginning discovery after being sued.

The commission has repeatedly violated their own procedural and ethical rules in handling this matter. The Commission, Special Counsel, and Complainant James work on a contingency fee agreement, they are not paid

unless they recommend that Petitioner has violated the ethical rules.[11]

PETITIONER WAS SUED BY COMPLAINANT MS. JAMES

What ever privilege existed was *waived* by Ms. James when she filed suit against Petitioner.

FEDERAL CRIMES COMMITTED BY SPECIAL COUNSEL AND THE COMMISSION, they used the phone and mail to threaten Petitioner. This constitutes the use of interstate commerce to commit the following crimes. *Perez v. United States*, 402 U.S. 146 (1971).

Extortion

18 U.S.C.A. Section 875(d). Extortion. Whoever. . . . from any person . . . any money or thing of value, transmits . . . any communication containing any threat to injure . . . or reputation . . . *U.S. v. Holder*, D.C. Mont. 1969, 302 F. Supp. 296, affirmed, 427 F.2d 715. *U.S. v. Pennell*, D.C. Cal. 1956, 144 F. Supp. 317.

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[11] The only thing proven at the preliminary hearing was that the fact that the Complainant James had committed numerous counts of perjury and social security fraud. Special Council Black has based his case on numerous ethical and criminal acts on his own part.

Threatening Communications

18 U.S.C.A. Section 876. Mailing threatening communications. Whoever with intent to extort from any person any money or . . . thing of value, so deposits. . . . any threat to injure . . . reputation. . . . *U.S. v. Ring*, C.A. Tenn. 1975 F.2d 1001. *U.S. v. Le Vison*, C.A. Alaska 1969, 418 F.2d 624. *U.S. v. Pennell*, 144 F. Supp. 320.

Blackmail

18 U.S.C.A. Section 873. Blackmail. Whoever under a threat of informing, or as a consideration for not informing, against any violation of any law . . . demands or receives any money or other valuable thing . . .

The Complainant, Special Counsel and the Commission have used the phones, mail and threats to deny Petitioner a trial, and force him to pay them.[12]

Petitioner has been threatened by Special Counsel and Commission Members that he makes their actions public he will be punished. If Petitioner appeals to the U.S. Supreme Court, he will be assessed additional costs and possible disbarment.[13]

Petitioner was told by the Commission basically: Pay Ms. James and the Commission or we will suspend your license. Do not defend the law suit against you or we will suspend your license. Ask for a hearing in either your

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[12] Clearly criminal conduct.

[13] The actions of the Complainant, Special Council, and the Commission resemble that of an organized crime syndicate.

ethical or civil suit and we will punish you. When Petitioner refused to pay Ms. James, Special Counsel was sent to intimidate Petitioner into paying.

Petitioner is being punished for asserting his rights and not paying Ms. James and the Commission. Petitioner is being punished for requesting a hearing, Petitioner has never received a fair hearing on his supposed ethical violations. There was *no trial* or hearing in the civil case filed against him by Complainant James.

There is no constitutional precedent for suspending Petitioners basic constitutional rights. Petitioner is charged with violations of ethical rules for defending when sued by a client. There is no case law that supports the Special Counsel or the Commission's position. Petitioner has a Constitutional right to defend after being sued, to counter-claim and begin discovery. *In re Chris Fairbanks Dennis* United States Bankruptcy Court For The District Of Montana, 7 Montana Bankruptcy Reports (December 15, 1988) pg. 115-120.

RETALIATION

Petitioner was threatened with a minimum 30 day suspension for appealing to the Montana Supreme Court. This court should be aware that the commission will retaliate against Petitioner for Appealing to the U.S. Supreme Court.[14]

[14] The conduct of this Commission and this hearing should shock the conscience of this court considering that this

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ARGUMENT

In Re Ruffalo, 390 U.S. 544, 551 88 S.Ct. 1222, 1226 (1968). The United States Supreme Court has pointed out that the practice of law is a "fundamental right". Therefore a compelling interest test must be applied. Petitioner has only exercised his right to plead not guilty and defend after being sued in open court in both the ethical and civil action; both have been denied.

Complainant James waived the confidentiality by taking a *dual* approach in suing Petitioner and filing a complaint against the Petitioner with the Commission *simultaneously*.[15]

The commission failed to prove that Petitioner violated any rule of professional conduct.

Rule 15 (c) Rules for lawyer Disciplinary Enforcement.

C. *Standard of Proof. Formal charges of misconduct and grounds for reinstatement shall be established by clear and convincing evidence.* (Emphasis added) This standard *has not* been met.

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is a Commission charged with enforcing ethical standards for attorneys. Special counsel requested additional punishment in his response to Petitioner's appeal to the Montana Supreme Court.

[15] Waiving the privilege.

Special Counsel stipulates there is no constitutional prohibition against defending after being sued. (Tr. 152 Ln. 6-13).[16]

VAGUE AND OVERBROAD

These charges against Petitioner are both vague and overbroad as they deny a person of reasonable intelligence notice as to what conduct is prohibited. Petitioner has been forced to guess at what he was charged with and what conduct is prohibited and what is not. *Gentille v. Nevada,* 111 S.Ct. 2720. This is a clear case of discriminatory enforcement.

Rule 13. ACCESS TO DISCIPLINARY INFORMATION. . . .

D. *Duty of Participants.* All participants in a proceeding under these rules *shall* conduct themselves so as to *maintain* the *confidentiality mandated by this rule.* (emphasis added) Here complaint James sued Petitioner mandating a complete, answer and defense by Petitioner. Thereby failing to maintain the confidentiality of these

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[16] Q. (By Mr. Nascimento) Do you know of any constitutional prohibitions that would prohibit an attorney from countersuing after they've been sued?

A. I'm not aware of any.

MR. BLACK: Mr. Chairman, I'll stipulate to that fact from here on till we're done with this.

MR. BROWN: All right. There are no constitutional prohibitions.

proceedings waiving what confidentiality privilege applied.

PETITIONER RELIED UPON

Lawyer's Deskbook & Directory 1990-1991 State Bar Of Montana p. 202[17]

RULE 1.6 Confidentiality of Information

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(2) *to establish a claim or defense on behalf of the lawyer . . . to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.* (emphasis added)

Petitioner reasonably relied upon this in attempting to mount a defense against the Civil Action filed against him.

The facts of this case allow Petitioner the right to defend and establish a claim, after being sued by his former client, Complainant James. (V. I *The Law Of Lawyering*: (First Edition) A Handbook on the Model Rules of Professional Conduct/Geoffrey C. Hazard, Jr., W. William Hodes, Prentice Hall Law and Business, c1990, p. 103). Disclosures made in Self-Defense. " . . . In these cases the

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[17] The Montana Rules of Professional conduct are published in a section of this Directory (phone book) sold to Attorneys by the State Bar.

lawyer must be allowed to meet the client on even terms, and not be bound by the self-interested version of the facts given by the client. . . . due process requires that the lawyer be permitted to present his claim or defense without handicap." *The Law Of Lawyering* p. 598. Dispute Concerning Lawyer's Conduct " . . . The right to defend, of course, applies where a proceeding has been commenced."

"§ 1.6:305 DISCLOSURES MADE IN SELF-DEFENSE

"Like the 'future harm' exception to confidentiality provided for in Rule 1.6(b)(1),[1] the 'self-defense' exception, set forth in Rule 1.6(b)(2), is also a direct descendant of the Code of Professional Responsibility.[2]

* * *

"The first clause of Rule 1.6(b)(2) permits disclosure to the extent necessary to 'establish a claim or defense in a controversy between the lawyer and the client.' The two most obvious examples of such a controversy are fee disputes * * * In both cases, the very heart of the controversy will be what the lawyer and the client said to each other, what they agreed upon, and who was responsible for decisions that backfired.[3]

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[1] 'Future harm' exception to confidentiality; see § 1.6:302.

[2] See DR 4-101(C)(4) of the Code and compare Restatement of the Law Governing Lawyers § 116, Tent. Draft No. 3 (1990).

[3] Responsibility for decision-making; see § 1.2:201. See generally, Restatement of the Law Governing Lawyers 116 (self-defense) and 117 (fee disputes), Tent. Draft No. 3 (1990).

"In this kind of case, the lawyer must be allowed to meet the client on even terms, and not be rendered helpless by the client's self-interested version of the facts. Once an adversarial relationship has developed, simple fairness demands that the lawyer be permitted to present his claim or defense without handicap. * * *

"The third and last clause of Rule 1.6(b)(2) concerns disciplinary or other proceedings brought against a lawyer on account of the lawyer's representation of a client. By and large, the same fairness argument should control, since the client will be the sole or principal complaining witness in most cases, and the lawyer should be able to testify freely, and to cross-examine fully.[4] * * * means that a lawyer may disclose confidential information about a client in order to defend herself once proceedings * * * are under way, * * *

"If even an innocent lawyer must wait until criminal or civil charges are actually filed, he may suffer severe and unwarranted loss of reputation, not to mention time and money, before achieving vindication. * * * " V. I *The Law of Lawyering:* (Second Edition) A Handbook on the Model Rules of Professional Conduct/Geoffrey C. Hazard, Jr., W. William Hodes, Prentice Hall Law and Business, c1992, pp. 174-176.

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[4] For the same reason as stated in the text, a lawyer may testify with respect to disputes with a client, free of the restrictions of the attorney-client privilege. See 8 Wigmore, Evidence § 2323 (1961).

Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing Law.

This could well be used to describe this entire process against Petitioner. A case *can not* be held frivolous until the following criteria have been met: 1. The case must be first decided on its merits. 2. A reasonable attorney would not have proceeded with the claim. 3. The action must be so indefensible as to be frivolous.

Case law in support of Petitioner

Sommer v. Carr, 299 N.W. 2d 856 (Wis. 1981), held the standard for determining a frivolous claim is to be determined by an objective reasonable attorney standard, whether attorney knew/should have known claim was so indefensible as to be frivolous. *State v. State Farm Fire and Casualty Co.,* 302 N.W. 2d. 827, 100 Wis. 2d 583 (1981) The court held that a reasonable attorney could believe the claim was valid. *Tower Special Facilities, Inc. v. Investment Club.,* 311 N.W. 2d 255, 104 Wis. 2d 211 (1981) Held Plaintiff must show frivolousness by proving the use of process was for an ulterior motive, criteria required for proving abuse of process. *Wrong v. Tabor,* 422 N.E. 2d 1279 (Ind. App. 1981) held the court requires that a heavy burden on charging party in Frivolous claims.

American Bar Association, The Judicial Role in Lawyer Discipline, *American Bar Association Standing Committee on Professional Discipline and Center for Professional Responsibility,* July 1983, pg. 106-108.

. . . a claim of malicious prosecution can only be made after the original suit has been adjudicated on the merits in favor of the claimant. (emphasis added)

A reasonable investigation is sufficient for probable cause to file a claim. *Bird v. Rothman*, 627 P. 2d 1097 (Ariz. App. 1981), 454 U.S. 865 (1981). Here Petitioner counter claimed, defended and began discovery.

STANDARDS USED TO DETERMINE FRIVOLOUSNESS

Most jurisdictions rely on statutes and rules of professional conduct to determine the criteria for proving that a frivolous claim was filed. Some courts rely on a subjective standard of bad faith, intention to harass or maliciously injure, when the attorney knew or should have known that the claim was meritless. The majority of cases, however, reflect an objective standard. "Would a *reasonable* attorney in the same circumstances have filed the claim on the basis of the facts known? Courts emphasize the key is not whether the plaintiff would prevail but whether a reasonable attorney should have known whether the claim was so indefensible as to be frivolous."

"The role of the trier of fact is to reconcile the facts known to the attorney about the case, whereas the judge's duty is to determine the legal significance of these facts and that they could have been the basis of a claim with probable cause. If a claim is capable of proof, even if the proof is later found to be insufficient, *State Farm, supra,* a reasonable attorney could believe the claim was provable. . . . The paucity of cases in which discipline is

imposed for filing a frivolous claim indicates the court's reluctance to interfere with the lawyer's subjective judgment as to the merits or a claim." Here Petitioner was sued, answered, counter-claimed and began discovery. The suit was stayed at the commissions insistence under great duress and under the threat of license suspension.

Constitutionally and ethically, there is no prohibition against these actions. The commission in its *over zealousness did not allow the case to be decided. Petitioner answered and counterclaimed and began discovery which cannot be frivolous and is constitutionally allowable.*

The Commission has no authority to suspend and decide civil litigation. Yet the Commission has forced Petitioner to drop his defense and counter claim and has decided that Petitioner should pay over $5,000.00 without a trial.

The standard applied Petitioner throughout this ordeal has been guilty, in spite of the evidence. Petitioner was charged with vague charges making it difficult at best to answer. The charges if upheld would make clearly legal conduct illegal.

Therefore they are vague and overbroad as set out in the following. *Papachristou v. City of Jacksonville* USCC 1972

The Commission has threatened Petitioner with discipline if he makes their actions public. This constitutes *a prior restrain* of First Amendment guarantee of Free Speech. *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312 (1951); *Butterworth v. Smith,* 110 S.Ct. 1376 (1990).

The confidentiality requirement prohibition constitutes a more drastic infringement of freedom of the press and freedom of speech than was present in *Mills v. Alabama*, 384 U.S. 214 (1966). What is more Fundamental than free speech, defense of charges against one and defense of a civil action brought against a person the right to a trial. Petitioner has been denied all of these rights.

The Commission's findings effectively shift the burden of innocence to that of guilt, with respondent having to prove his innocence and never receiving a trial. Once the Commission report is sent to the Supreme Court of Montana the burden of proving innocence is on attorney contrary to basic Constitutional presumptions of innocence.

Here Petitioner has established a Due Process right to be protected, his reputation and license to practice law. Petitioner is entitled to *due process protection* of and has *established the existence of a property right and liberty interest that is accorded due process protection*. Discipline on Petitioner will place a stigma on him as to deprive him of a liberty interest.

FAIR TRIAL

Petitioner has been denied a fair and impartial Preliminary hearing and has received no trial. Petitioner is being punished severely for asserting his right to plead not guilty and defend on the merits.[18]

[18] Petitioner has represented over 477 clients and has been successful in all except two occasions. It appears that

(Continued on following page)

CIVIL RIGHTS

Did the action taken by Elmira James, Special Counsel and the Commission deny Petitioner his federal civil rights. 42 U.S.C. section 1983 (1976). *Holladay v. St.*, 506 F.Supp. 1317, 38 St. Rep 285 (D.C. Mont. 1981) held State officials liable for civil right violations. *Hafer v. Melo*, 112 S.Ct. 358 (1991).

The actions taken against Petitioner are tantamount to a denial of due process under the United States Constitution. Simply because a person is an attorney does not mean that *he is stripped of free access to the courts and* the use of the *legal process to remedy civil wrongs, This right is governed by law and not discretion. Wimberly v. Rogers*, 557 F.2d 671 (9th Cir. 1977).

Clearly denial of the right to plead not guilty, failure to a fair preliminary hearing, to charges, denial of right to respond when sued and failure to allow discovery both as a defendant in a civil suit and before the Commission violate Petitioners constitutional rights.

(Continued from previous page)

complainant James with the help of the Commission and some other attorneys seek to put Petitioner out of business by waging a campaign of economics and character assassination against him. Complainant James filed a suit against me, Petitioner has a right to defend and find out who the true parties in interest are.

REASONS FOR GRANTING CERTIORARI

There are two strong reasons for granting Certiorari.

ATTORNEY DISCIPLINE

There are thousands of attorney discipline cases filed each year with jurisdiction offering widely varing degrees of Constitutional protection and subjecting attorneys to random constitutional safe guards. There is a pressing need to finally settle this issue.

This case offers the Court a unique opportunity to determine:

___ What minimum constitutional protection an attorney is entitled to

___ What relief an attorney can be granted by the Federal Judiciary

___ At what point can the disciplinary process be declared unconstitutional

___ Whether Commission members can be held accountable for their actions.

Trial

Petitioner has been denied a trial in the civil action filed against him. There was a sham preliminary hearing on the ethical charges. When attorneys are denied due process, notice of the charges against them, the right to plead not guilty, the right to a fair hearing, and the right to a trial then the American constitutional system of justice will cease to exist in its present form. Not even the

Commission can suspend the constitution. If the state is allowed to suspend the constitution then no citizen is safe.

EQUITABLE CONSIDERATIONS

Failure to set aside this decision will set a dangerous precedent whereby attorneys will lose their basic Constitutional rights to defend against a lawsuit filed against them. Attorneys will also lose their right of free speech. To actively protect their clients and pursue litigation without the commission being used as a tool for compromise of attorneys' rights and their client's claims.

It will encourage further misconduct and abuses by dishonest clients, unethical attorneys, and deny every person residing in the United States the right to full redress.

It will place commission members and their friends above the law with no method to challenge their authority.

Failure to overturn the Petitioners Public reprimand and $5097.65 assessment of costs will set back attorney, client and judicial rights. By denying attorneys free speech and the right to answer, counter claim, defend, and begin discovery it will deny the judiciary the right of full disclosure of facts in cases pending before judges.

Petitioner will be left with what is in effect a felony in the legal community on his record.[19] For answering and defending after being sued. A conviction will hamper Petitioner if he decides to relocate in another state. Petitioner has not committed any ethical violations. The action against Petitioner violates the Petitioner's Constitutional rights.[20]

CONCLUSION

Complainant waived the immunity when she sued Petitioner. Petitioner has a constitutional right to answer, counter-claim, begin discovery and defend in the civil action filed against him. Petitioner has the right to a trial in the civil action filed against him. The charges against Petitioner are both vague and overbroad.

Petitioner was denied a fair and impartial preliminary hearing on the ethical charges filed against him. Petitioner has received no trial on the ethical charges

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[19] It will brand Petitioner a felon within the legal community, a dishonest and unethical attorney. Barring him from Federal, State, Local employment opportunities, the ability to move to a new State and practice Law. It will also bar him from even appearing before the U.S. Supreme Court for at least a three year period.

[20] Prior to even an investigation the Commission sent Petitioner a letter stating he had violated the above mentioned ethical rules. Petitioner requested the Commission disqualify themselves but the Commission never did claiming they never bothered to read Petitioner's answer or Exhibits.

filed against him. Petitioner's Constitutional rights have been violated.

Petitioner prays that this Court:

1. That the judgment against Petitioner be reversed.

2. That Petitioner be awarded reasonable attorney's fees and costs in defending this matter.[21]

3. That Petitioner be allowed a trial on the civil case filed against him.

4. That the Commission On Practice as it now is constituted by declared unconstitutional.

Submitted this 11th day of February 1992.

JOSEPH F. NASCIMENTO
Attorney at Law

1338 Eleventh Avenue
Helena, Montana 59601
(406) 449-8280

Pro Se

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[21] The actions of State officials warranty the imposition of sanctions. In the form of cost and an hourly rate to compensate Petitioner in defending this matter. The actions taken against Petitioner are repugnant by an organization in power to enforce ethics for attorneys. The actions taken against Petitioner are unconstitutional, unethical and illegal. Commission has acted more like a criminal organization than a Commission on Practice.

APPENDIX TABLE OF CONTENTS

Appendix A – Opinion Montana Supreme Court.....App. 1

Appendix B – Testimony of Complainant Elmira James.....App. 9

Appendix C – Testimony in Support of Petitioner of the Honorable Mark Racicot Attorney General..... App. 17

Appendix D – Testimony in Support of Petitioner County Attorney Mike McGrath.. App. 18

Appendix E – Testimony in Support of Petitioner Judge Dennis Julio..... App. 19

Appendix F – Testimony in Support of Petitioner Judge Thomas Honzel.....App. 20

Appendix G – Motion for Continuance Complainant Civil Suit.....App. 21

Appendix H – Motion for a Stay Civil Suit... App. 23

Appendix I – Affidavit of David N. Niklas Attorney in Support of Petitioner.....App. 25

Appendix J – Affidavit of Honorable Gene B. Daly in Support of Petitioner.. App. 27

Appendix K – Affidavit of Dennis G. Loveless, Attorney in Support of Petitioner.....App. 29

Appendix L – Affidavit of Kathy R. Nascimento in Support of Petitioner.....App. 31

Appendix M – Rules of Professional Conduct & Procedure Violated by Special Counsel & the Commission....App. 34

Appendix N – The Threats Esculate and Continue..... App. 42

APPENDIX A

Opinion of the Montana Supreme Court

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 90-613

IN THE MATTER OF JOSEPH F. NASCIMENTO, an Attorney at Law, Respondent.	ORDER (Filed Nov. 21, 1991)

Complainant contacted the Commission on Practice and alleged that Joseph F. Nascimento violated Montana Rules of Professional Conduct 1.16 and 3.1, and Montana Rules of Lawyer Disciplinary Enforcement 7, 10, and 13. The Commission held a formal hearing on March 13, 1991, found that Nascimento had violated these rules, and entered findings of fact and conclusions of law. The Commission recommended public censure, repayment of the complainant's fees, and reimbursement of the Commission's expenses. Nascimento objects to the actions of the Commission. We affirm and adopt the Commission's findings, conclusions, and recommendations.

Nascimento raises 15 issues. Most of these relate to alleged misconduct by Complainant, the Commission, and the Commission's Special Counsel. We believe Nascimento's misconduct allegations are irrelevant and that the only relevant issues are whether the record contains

sufficient evidence to support the findings of the Commission. Thus, we restate the issues as follows:

1. Does the record contain clear and convincing evidence to support the Commission's finding that Nascimento violated Montana Rule of Professional Conduct 1.16?

2. Does the record contain clear and convincing evidence to support the Commission's finding that Nascimento violated Montana Rule of Professional Conduct 3.1, and Montana Rules of Lawyer Disciplinary Enforcement 7, 10, and 13?

Complainant retained Nascimento to represent her in an uncontested marriage dissolution. Complainant agreed in writing to pay a flat fee of $375. This flat fee was to include filing fees of $135, which left $240 as attorney fees. Complainant actually paid Nascimento the full $375, and Nascimento drafted a dissolution petition. Then, for reasons not relevant to this proceeding, Complainant grew dissatisfied with Nascimento's services. She terminated the representation and demanded her money back. Nascimento refused to refund the fee. Complainant immediately contacted the Commission to initiate disciplinary proceedings against Nascimento.

Subsequently, Complainant attempted to recover the money by suing Nascimento in small claims court. Nascimento counterclaimed for intentional infliction of emotional distress, libel, and slander. He based his defamation claims on Complainant's communication with the Commission. His counterclaim necessarily resulted in making Complainant's communication with the Commission a matter of public record.

Actions involving our power to regulate the practice of law involve a unique standard of review. In *In re Pederson*, No. 91-250 (Mont. Nov. 14, 1991), we considered the appropriate standard of review to apply in cases involving challenges to the actions of the Character and Fitness Committee. We said:

> The Montana Constitution provides that this Court has the power and obligation to regulate the admission of attorneys to the Montana Bar. Mont. Const. art. VII, § 2, cl. 3. The Committee on Character and Fitness assists this Court in fulfilling its obligation to regulate the admission of attorneys in Montana. However, the ultimate decision regarding the admission of attorneys in Montana rests exclusively with this Court. Upon reviewing a final decision of the Character and Fitness Committee we will conduct an independent review of the entire record to determine if the Committee erred.

Pederson, slip op. at 4-5. This standard of review applies with equal force to appeals from actions of the Commission on Practice. *See In re Johnson* (1979), 182 Mont. 486, 597 P.2d 740. In *Johnson*, we noted that even though we conduct an independent review of the record, the appellant still bears the burden of showing that the Commission's findings are not supported by the evidence or that its recommendations are erroneous or unlawful.[22] *Johnson*, 597 P.2d at 742. With this standard of review in mind, we turn to the specific allegations before the Commission.

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[22] An unconstitutional Standard. It should be noted that Justice Daily, Montana Supreme Court retired, who provided counsel for Petitioner during this case sees no violations committed by Petitioner. Justice Daily was a member of the court in *In re Johnson* (1979). See Justice Daily's comments at Appendix 27.

I

Does the record contain clear and convincing evidence to support the Commission's finding that Nascimento violated Montana Rule of Professional Conduct 1.16?

Montana Rule of Professional Conduct 1.16(d) provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled *and refunding any advance payment of fee that has not been earned*. The lawyer may retain papers relating to the client to the extent permitted by other law. [Emphasis added.][23]

It is undisputed that Nascimento refused to refund any of the $375 flat fee.

Nascimento claims that his refusal to turn over the money was justified. He alleges that he was entitled to keep the money because Complainant agreed to a modification of the fee agreement when it became apparent that Complainant's husband might contest the dissolution.

---

[23] Emphasis had to be added to clarify which portions of paragraphs Petitioner supposedly had violated. Thereby depriving Petitioner reasonable notices of what the charges were.

We disagree. Rule 1.16 provides that the attorney must refund unearned fees. Here the fee agreement provided for $135 in filing fees. Nascimento did not file any papers, so he owed Complainant at least $135 upon termination of the representation. The record clearly shows that he refused to refund any of the flat fee, not just the portion he claimed as attorney fees. We find no merit in Nascimento's argument that Complainant consented to an hourly rate if her husband contested the matter. The original written fee agreement does not so provide, and Nascimento was unable to produce a written modification signed by Complainant.

We hold that the Commission's finding that Nascimento violated Rule 1.16 is supported by clear and convincing evidence.

II

Does the record contain clear and convincing evidence to support the Commission's finding that Nascimento violated Montana Rule of Professional Conduct 3.1, and Montana Rules of Lawyer Disciplinary Enforcement 7, 10, and 13?

Montana Rule of Professional Conduct 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Montana Rule of Lawyer Disciplinary Enforcement 10(A) provides:

> Communications or complaints, oral or written to the Commission, grievance committee, special counsel or investigators acting for the Commission or a grievance committee, and testimony given in the proceedings are privileged, and no evidence thereof is admissible in any lawsuit against any complainant or witness. Waiver, if any, of such privilege by voluntary disclosure by a complainant or witness shall be determined under Rule 503, Mont.R.Evid.

Rule 13 provides that a breach of disciplinary confidentiality is contempt of this Court and Rule 7 generally provides for disciplinary sanctions for violations of ethical canons and disciplinary rules. Montana Rules of Lawyer Disciplinary Enforcement 13 and 7.[24]

Nascimento argues that Complainant waived confidentiality by filing the underlying action in the small claims court. But Rule 10(A) provides that the complainant can only waive the privilege by voluntary disclosure. What Complainant disclosed in the small claims action was the fact that Nascimento had retained her money after termination of the representation. She did not voluntarily disclose her communication with the Commission. We cannot agree that Complainant's attempt to recover her money amounted to a waiver of disciplinary confidentiality – these were separate issues. Thus, the

---

[24] Although Petitioner has been disciplined for answering counterclaiming and defending a lawsuit filed against him by the complainant and Petitioner has had no notice that his conduct was prohibited. Commission members have openly violated their own procedural and ethical rules with immunity.

mere filing of the counterclaim was a violation of Montana Rules of Lawyer Disciplinary Enforcement 7, 10, and 13. Furthermore, the counterclaim was frivolous because all of the evidence necessary to support it was privileged and therefore inadmissible. Frivolous claims violate Montana Rule of Professional Conduct 3.1.

We hold that the record contains clear and convincing evidence to support the Commission's findings that Nascimento violated Montana Rule of Professional Conduct 3.1, and Montana Rules of Lawyer Disciplinary Enforcement 7, 10, and 13.

ACCORDINGLY IT IS HEREBY ORDERED AND ADJUDGED:

1. That Joseph F. Nascimento be publicly censured before the Supreme Court of the State of Montana and shall appear before this Court in Helena, Montana, for the administration of a public censure on the 12th day of December, 1991, at 10:00 o'clock A.M.

2. That Joseph F. Nascimento be required to repay Complainant in accordance with the recommendation of the Commission on Practice.

3. That Joseph F. Nascimento be required to pay the costs of these proceedings.

4. The clerk is directed to mail copies of this order shall be mailed to Joseph F. Nascimento; Special Counsel Greg Black, Attorney at Law, Butte, Montana; the Chairman and Secretary of the Commission on Practice; and the Executive Director of the State Bar of Montana.

DATED this 20th day of November, 1991.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Terry Triweilder

/s/ R. C. McDonough

/s/ William E. Hunt, Sr.

/s/ Karla M. Gray

/s/ Fred Weber
Justices

APPENDIX B

Testimony of Complainant Elmira James the Commissions Only Witness Against Petitioner.

(p. 36) Q. Did you contact Mr. Nascimento the following Tuesday, which was the 17th?

A. I called and I got the receptionist and I told her to give Mr. Nascimento the message that I would like to come in at one o'clock on the 17th because of my work schedule.

* * *

A. Yes. And, then, if this wasn't acceptable to please call me.

* * *

Q. Did you wait by the phone for a return call?

* * *

Q. Did Mr. Nascimento return your call that morning?

A. He did not.

Q. Did you go to Mr. Nascimento's office?

A. Yes, I did.

Q. When you arrived, was he available to meet with you?

A. No, he was not.

* * *

(p. 37) Q. Did you wait for him?

A. I waited for half an hour.

* * *

(p. 40) Q. Did you receive any advice on the 17th from any attorney with respect to a complaint with the Commission on Practice?

A. No, I did not.

* * *

(p. 43) Q. Did you tell him that there was a lawyer involved in this?

A. No, I did not.

* * *

(p. 44) Q. Now, in May, you filed a complaint in Justice Court is that correct?

A. Yes, I did.

* * *

(p. 45) Q. Now, did you have the assistance of an attorney in filing this complaint in Justice Court?

A. No, I did not.

* * *

Q. Did you have any assistance in preparing the petition for dissolution and associated papers which you (p. 46) filed?

A. No.

* * *

Q. Did you have a hearing in front of Judge Honzel?

A. Yes.

* * *

(p. 47) Q. Did you have the assistance of any attorney in obtaining your own divorce in June of 1990?

A. No, I did not.

* * *

(p. 48) CROSS-EXAMINATION

BY MR. NASCIMENTO:

Q. Do you understand that you're under oath here today?

A. Yes, I do.

(p. 49) Q. Did you ever tell me that you had an attorney prepare the paperwork for you?

A. No, I did not.

Q. Did you ever tell me that you paid a fee to an attorney to help you prepare your paperwork?

A. No, I did not.

Q. Did you ever tell anybody that you had an attorney prepare the paperwork?

A. No, I did not.

* * *

(p. 50) Q. Did you ever tell me in a telephone conversation that I was liable to pay you damages for showing up at my office early?

A. No, I did not.

* * *

Q. And no one helped you prepare your small-claims action against me?

A. No.

* * *

(p. 51) Q. And who helped you on the interrogatories?

A. Mr. Mayo Ashley.[25]

* * *

(p. 52) Q. Did you testify in Judge Honzel's chambers under oath?

A. Yes.

Q. And did you testify that all of the allegations in this pleading were correct?

MR. BLACK: What pleading are you referring to?

MR. NASCIMENTO: The divorce dissolution.

THE WITNESS: If it's – if it says that it's unreconcilable, if I can pronounce the word, yes, I did.

Q. (By Mr. Nascimento) And the actual reason for this you're claiming now was for Social Security benefits?

---

[25] An attorney. Petitioner apparently has made a few enemies in building his practice. Petitioner is entitled to know who sent Jones into his office to set him up.

A. Yes.[26]

* * *

(p. 62) MR. NASCIMENTO: If I may recap your testimony.

Q. (By Mr. Nascimento) You have stated you never told me that an attorney advised you to do this?

A. That's right, I never did.

Q. And you also told me – stated here that you have never told me that you paid an attorney at least some fees?

A. I never told you that.

* * *

Q. (By Mr. Nascimento) You also stated that you had no advice in filling out this dissolution and you also stated, if I'm correct, that you were having no marital problems at the time.

A. That's right.

* * *

(p. 67) Q. Did you go through this divorce process for the sole purpose of reestablishing your right to the Social Security survivor benefits?

---

[26] The only thing proven at the hearing was that Complainant James had committed numerous counts of perjury. Special counsel has based his claim against me on perjury, ethical violations, and criminal conduct by Complainant James special council and Commission Members.

A. Yes.

Q. Ad you did it at the time you – and at the time you did it, you intended to continue your relationship with Mr. James?

A. Yes.

* * *

(p. 182) – Telephone conversation between Joseph Nascimento and Elmira James – April 18, 1990 –

"JOE NASCIMENTO: Hello.

ELMIRA JAMES: Yeah, Joe?

JOE NASCIMENTO: Yeah.

ELMIRA JAMES: Yeah. (Laughter) Yes, are you gonna give me any of my money back?

JOE NASCIMENTO: For what?

ELMIRA JAMES: For services that weren't rendered.

JOE NASCIMENTO: Well, I've already worked on your case. Like I told you before, if you tell me which attorney told you to file the complaint. I'm entitled to know.

(p. 183) ELMIRA JAMES: No, you'll have to find out from somebody besides me, because I paid for the advise and I do not have to tell you because the Commission told me that, that I don't have to tell you

who my legal advisor was.[27] But, I do want some money back.

JOE NASCIMENTO: Well, as far as your legal advisor, someone advised you to file a complaint against me. I have a right to know.

ELMIRA JAMES: That's not what I was told, but then that's besides the point. We're talk –

JOE NASCIMENTO: While we've got a complaint going, I'm not going to deal with you anymore, and –

ELMIRA JAMES: Well, then I'll have to take you to court to get my money.

JOE NASCIMENTO: Well, I've already provided services for you.

ELMIRA JAMES: No, you haven't.

JOE NASCIMENTO: If you can't keep your appointments when you come in early, it's not my problem.

---

[27] Petitioner is entitled to discovery even if the Commission and their friends are exposed.

ELMIRA JAMES: Oh, yes it is. I've already checked on that. So, I will take you to small claims court."[28]

* * *

---

[28] Petitioner has requested an investigation be conducted into the action of Complainant James, Special Council, and Commission Members but was informed by the Attorney General that by statute he does not have the power to initiate a criminal investigation against these individuals.

James initially took a dual approach by suing me and filing a complaint against with the Commission on Practice. The Complainant waived the confidentiality by taking a dual approach and repeatedly calling my office and stating that she had been paid to set me up. The Complainant also on numerous occasions informed Petitioner that the Commission Members had also aided her in her dual attack on Petitioner.

APPENDIX C

Testimony in Support of Petitioner of the Honorable Mark Racicot Attorney General of the State of Montana.

(p. 56) MR. NASCIMENTO: It states that most of her case and Mr. Black's is based on false evidence, lies and perjury.

MR. BROWN: And the question to the Attorney General is whether perjury is a crime in Montana; is that correct, essentially what you're asking him?

* * *

(p. 57) MR. BLACK: I'd stipulate to that, Mr. Chairman.

* * *

Q. (By Mr. Nascimento) Do you know of any constitutional prohibition against responding to a lawsuit when you're the defendant?

A. No.

* * *

APPENDIX D

Testimony of County Attorney Mike McGrath in Support of Petitioner.

(p. 146) Q. Do you know of any constitutional prohibition that would bar an attorney who was sued from filing a counterclaim?

MR. BLACK: Objection, we've heard this twice now.

MR. NASCIMENTO: Different witnesses.

MR. BROWN: Overruled. Go ahead and answer the question.

THE WITNESS: I'm not aware of any constitutional bar to that, no.

* * *

APPENDIX E

Testimony of Judge Dennis Jullio in Support of Petitioner.

(p. 137) Q. Do you know of any constitutional prohibition.

* * *

(p. 138) that would prevent someone who is sued from defending on the merits or counterclaiming?

* * *

THE WITNESS: I know of none.[29]

* * *

---

[29] Judge Dennis Jullio was the trial Judge scheduled to hear the civil suit filed against me by Complainant James.

APPENDIX F

Testimony of Senior District Court Judge The Honorable Thomas Honzel on Petitioner's Behalf.

(p. 15) Q. And would she testify under oath?[30]

* * *

(p. 17) Q. And after that, there's a verification that's sworn by Ms. James?

* * *

Q. And does that verify that the pleadings are correct and true to the best of Ms. James's knowledge?

A. Yes, that's what it states.

* * *

(p. 20) Q. Would you have granted Ms. James's dissolution if she had told you in chambers it was to collect Social Security?

A. I don't think so.[31]

---

[30] Judge Honzel testifying as to the reason and the pleading filed by James in eventually obtaining her divorce.

[31] Judge Honzel would not have granted James's divorce had he known that her pleading were false, her testimony was false, and her whole divorce proceedings were based on perjury.

APPENDIX G

IN THE SMALL CLAIMS DIVISION OF THE JUSTICE COURT OF LEWIS AND CLARK COUNTY BEFORE THE HONORABLE WALLACE JEWELL, JUSTICE OF THE PEACE

ELMIRA JAMES and OWEN JAMES,
Plaintiffs,
-vs-
JOSEPH F. NASCIMENTO,
Defendant.

Cause No. C90-156

MOTION FOR CONTINUANCE

(Filed July 21, 1990)

COMES NOW, the above named Plaintiffs and hereby move this Court for a continuance of the Hearing currently scheduled for August 24, 1990.

This Motion is made and based upon the fact that there is currently pending a petition before the Commission on Practice of the Supreme Court of the State of Montana which may resolve the issue.[31]

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[31] Complainant's dual attack on Petitioner thereby waiving confidentiality.

Respectfully submitted this 21st day of August, 1990.

/s/ Elmira James
Elmira James

/s/ Owen James
Owen James

APPENDIX H

IN THE SMALL CLAIMS DIVISION OF THE JUSTICE COURT OF LEWIS AND CLARK COUNTY BEFORE THE HONORABLE WALLACE JEWELL, JUSTICE OF THE PEACE

ELMIRA JAMES and OWEN JAMES,
Plaintiffs,
-vs-
JOSEPH F. NASCIMENTO,
Defendant.

Cause No. C90-156

Motion to Stay Proceedings

COMES NOW the defendant in the above named action and respectively requests the following:

1. That the trial date of this action be stayed indefinitely the reason for this is that officials of the State Bar have requested that I seek a stay in this matter.

2. That my counter claim be dismissed with-out prejudice. The above requests are not voluntarily filed by the defendant in this action. The defendant is only filing this motion under extreme duress at the request of the State Bar and Supreme Court Representative.[32]

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[32] The Petitioner was forced to stay the defense of a lawsuit brought against him only under threats from Commission

(Continued on following page)

There for [sic] the defendant prays:

1. That an indefinite stay be issued in this matter.

2. That Defendants counter claim be dismissed with-out prejudice.

Submitted this 5th day of October 1990.

/s/ Joe Nascimento
BY DEFENDANT
JOE NASCIMENTO

(Continued from previous page)

Members and Special Council against both the Petitioner and his family.

APPENDIX I

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

David N. Niklas[33], being duly sworn, state as follows:

1. That I have spoken with Appellant on at least 30 (thirty) occasions concerning this complaint. I reviewed the entire file and I DO NOT see where Appellant has committed any Ethical violations.

* * *

3. Upon reading Ms. James complaint and the violations Appellant is charge with, I do not see where Appellant has violated any Ethical rules. I have been a practicing attorney since 1965 and DO NOT see where any reasonable attorney would have handled this matter differently than Appellant. It appears Appellant is being punished for asserting his innocence.

* * *

/s/ David N. Niklas
David N. Niklas Attorney at Law
Power Block Suite 4
Helena, MT 59601

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[33] Attorney Niklas has been practicing in Montana since 1965 and has served on various State bar committees and is one of the authors of Handbook(s) used as a reference guide to help attorneys in the practice of Law.

Subscribed and sworn to before me this 11th day of June 1991.

/s/ Cindy L. Jungers
Notary Public for the
State of Montana
Residing at Helena, Montana
My Commission Expires
10-11-92

(Seal)

APPENDIX J

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

Gene B. Daly[34], being duly sworn, state as follows:

1. That I was personally present During Mr. Gregg Blacks interview/interrogation of Respondent Joseph F. Nascimento.

2. Mr. Black used the words "I don't want to hear any more of this CRAP and I don't want to hear any more of this Shit" as Respondent attempted to answer question put to him.

3. Mr. Black was extremely intimidating and repeatedly threatened Respondent with discipline for any failure to answer or turn over documents.

4. It is my personal opinion after many years of practice and time on the bench that this conduct is totally unacceptable.

* * *

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[34] The Honorable Gene B. Daly, Montana Supreme Court retired was in fact one of the Judges who wrote the opinion upon which the Montana Supreme Court upheld the Commission's recommendations. Justice Daly as well as numerous others do not see any ethical violations on Petitioner's part. Justice Daly was shocked and outraged at the conduct of the Commission.

Dated this 4th Day of January 1991.

/s/ Gene B. Daly
Gene B. Daly,
Justice Supreme Court Retired
1805 Joslyn #150
Helena, MT 59601

/s/ Susan L. Spurlock
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
July 1, 1991

APPENDIX K

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

DENNIS G. LOVELESS, being first duly sworn, states as follows:

1. That I have spoken with the Appellant, Joe Nascimento, on at least sixty (60) occasions concerning this complaint and from the information relayed to me, I am confused as to what ethical violations Appellant was supposed to have violated.

* * *

3. I would appear, pursuant to the Rules of Civil Procedure, the Montana Constitution and the U.S. Constitution, that the Appellant would be entitled to defend himself after being sued, including beginning discovery and filing any counter claims that may be required and/or permitted.

DATED this 2 day of June, 1991.

/s/ Dennis G. Loveless
Dennis G. Loveless
Attorney at Law
P. O. Box 225
Helena MT 59624

SUBSCRIBED AND SWORN to before me this 12 day of June, 1991.

/s/ Susan L. Spurlock
Notary Public for
State of MT Residing at
Helena Montana
My commission expires
July 1, 1991

(SEAL)

APPENDIX L

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

Kathy R. Nascimento, being duly sworn, state as follows:

* * *

2. Special Counsel Black called my home on the night of October 3rd 1990 and I did not want to speak with him at that time. I informed Mr. Black that my five year old daughter was in the tub. I asked Mr. Black if he could meet me in person. He said no. I asked if I could make any other arrangements to speak with him he said no.

* * *

3. Mr. Black informed me that if I did not speak with him right now my husband's license to practice law would be effected. I felt extremely threatened by Mr. Black. Mr. Black stated that if I did not speak with him my husband would suffer the consequences.

4. I do not appreciate being threatened at home or having to leave my daughter in the middle of her bath.[35]

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[35] Complainant, Special Council, and Members of the Commission acted more like an organized Crime syndicate than a Commission on Practice. Petitioner believes that appropriate sanctions against the State for allowing this type of

(Continued on following page)

5. I tried to make this known to the commission but they refused to listen. (Tr. 164-165).

6. I never thought I would see the day that my husband and myself would be threatened and intimidated by individuals claiming to represent the Supreme Court.

* * *

8. During breaks members of the commission socialized with special counsel. It appeared to be a rigged hearing, they were just going through the motions.[36]

9. The only thing proven at the hearing before the commission was that Ms. James committed perjury.

(Continued from previous page)

conduct to be committed against Petitioner and his family. Petitioner respectively request that he be awarded attorney's fee's and costs to the pursuit of his action to the Supreme Court. The conduct of the Commission being that of one to enforce ethical standards and set ethical standards for attorneys is outrageous and should shock the conscience of this court.

[36] Petitioner has taken an oath to uphold the Constitution not to be shaken down. The actions of State officials warranty the imposition of sanctions, in the form of cost and an hourly rate to compensate Petitioner. The acts of the Commission are repugnant by an organization in power to enforce ethics for attorneys. The actions taken against Petitioner are unconstitutional, unethical and illegal. Commission has acted more like an organized crime group than a Commission on Practice. Petitioner has spent over $50,000.00 dollars of his own resources and time, cost, and loss of business at an attempt to clear his name and be able to defend a lawsuit filed against him in an open courtroom the right to have a trial.

Dated this 12th Day of June 1991.

/s/ Kathy R. Nascimento
Kathy R. Nascimento
P.O. Box 5973
Helena, MT 59601

Subscribed and sworn to before me this 12 day of June 1991.

/s/ Terry Zimmerman
Notary Public for the
State of Montana
Residing at
Helena, Montana
My Commission Expires
7-17-93

(Seal)

APPENDIX M

Ethical and Procedural Rules violated by Special Counsel and the Commission, taken from The Rules of Professional Conduct.

Lawyers Deskbook & Directory 1990-91 pp. 192-210.

Rules of Professional Conduct

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 84-303

IN THE MATTER OF THE ADOPTION
OF THE AMERICAN BAR ASSOCIATION
MODEL RULES OF PROFESSIONAL CONDUCT

ORDER ADOPTING RULES OF PROFESSIONAL CONDUCT

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* * *

Rule 5. EXPENSES

Investigators and special counsel shall be compensated in such amounts as the Supreme Court may authorize from time to time. Investigators and special counsel shall be entitled to reimbursement for all travel and other expenses reasonably and necessarily incurred by them in the performance of their duties.[37]

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[37] Paid for by the Petitioner only on a recommendation of an ethical violation. The commission is essentially working on

(Continued on following page)

* * *

Rule 9. GENERAL

A. Screening Allegations of Grounds for Discipline.

* * *

Also, the Commission may cause an investigation to be instituted if it becomes aware by any means, of information of possible misconduct by a lawyer.

* * *

C. Formal Disciplinary Proceedings. Formal disciplinary proceedings may be instituted against respondent at the direction of the Commission at any time after an allegation of grounds for discipline against respondent comes to the attention of the Commission,[38]

* * *

D. Discovery. Special counsel and respondent shall be afforded reciprocal discovery.[39] Disputes concerning

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(Continued from previous page)

a contingent fee basis. Find Petitioner guilty and Complaintant, Special Counsel and the Commission are reimbursed.

[38] But the Commission can violate any ethical or Procedural Rule without any consequences. Because they are the Commission and can do what they want when they want.

[39] Petitioner has been denied discovery. Special Counsel had access to whatever he wanted. I was denied the right to see my own file. The reason being it's confidential. Petitioner was given access to only 9 pages of my file. I still have no idea what is in my file(s) or their size because I was denied access.

(Continued on following page)

the scope and other aspects of discovery shall be determined by the chairperson of the Commission.

* * *

Rule 15. ADDITIONAL RULES OF PROCEDURE

* * *

F. Related Pending Litigation. The proceeding of a disciplinary matter shall not be delayed because of substantial similarity to the material allegations of pending criminal or civil litigation unless the Commission in its discretion authorizes a stay for good cause shown.[40]

* * *

(Continued from previous page)

Only the Commission and Special Counsel know what it contains.

TR 138

MR. NASCIMENTO: I would like to introduce the investigator's report.

MR. BLACK: I'm going to object, Mr. Chairman. That's a confidential report and if I waive the confidential provision

* * *

MR. BROWN: Mr. Nascimento, I think that when you asked for that, we told you that that is usually a confidential part of the file, that it is not distributed.

[40] Petitioner has been threatened in order to stay pending civil litigation. See App. H.

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

* * *

(b)

* * *

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;[41]

* * *

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid

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[41] Here the entire case against Petitioner is based upon Perjury and Fraud. Both by Complainant James and Special Counsel.

assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client

* * *

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) the duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

* * *

RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely

* * *

(d) in pretrial procedure, * * * fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;[42]

* * *

RULE 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

* * *

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, * * * disclose to the defense and to the tribunal an unprivileged mitigating information known to the prosecutor,[43]

* * *

RULE 4.1 Truthfulness in Statement to Others

* * * a lawyer shall not knowingly:

(a) make a false statement of material fact or law * * *

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[42] Here Special Counsel has violated Rule 3.3 A(1), (2) (3) (4) B & C. Rule 3.4 (A) (B) & (D). Apparently Special Counsel and Commission members are not bound by the ethical rules they claim to enforce.

[43] Special Counsel has violated these Rules.

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a Client, unless disclosure is prohibited by Rule 1.6.[44]

* * *

RULE 4.4 Respect for Rights of Third Persons

* * * a lawyer shall not use means that * * * or use methods of obtaining evidence that violate the legal rights of such a person.[45]

* * *

RULE 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:[46]

* * *

RULE 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

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[44] Special Counsel has violated these Rules.

[45] Special Counsel and the Commission have violated these Rules, by attempting to deny Petitioner a trial.

[46] Special Counsel and the Commission have violated this Rule. By splitting the costs they assessed Petitioner with Complaintant a nonlawyer.

* * *

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;[47]

* * *

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[47] Special Counsel and Commission members represent some of the state of Montana's lawyers and more powerful law firms. Apparently they *do not* have to follow their own Procedural or Ethical rules.

APPENDIX N

The Threats Escalate and Continue

SPECIAL COUNSEL'S BRIEF IN SUPPORT OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE COMMISSION ON PRACTICE

Taken from pp. 24-26

RECOMMENDATIONS ON DISCIPLINE

The Commission has recommended that Nascimento be disciplined by being publicly censured, by repaying the entire fee to James and by paying the cost of investigation and prosecution.

* * *

Nascimento has approached the entire disciplinary process with an attitude described by the Commission as "beligerent denial." * * * From the outset of this matter, Nascimento has refused to accept responsibility for his overwhelmingly clear ethical violations.

* * *

Despite the overwhelming evidence against him, Nascimento has refused to acknowledge his wrongdoing or show any sign of remorse.

* * *

Special Counsel recommends that in addition to the discipline recommended by the Commission, Nascimento should be suspended from practice for a period of 30 days, subject to reinstatement thereafter only upon his repayment of $375.00 to James and payment of the costs

and fees incurred by Special Counsel in the investigation, prosecution and appeal of this matter.[48]

RESPECTFULLY SUBMITTED this 2 day of August, 1991.

/s/ Gregory C. Black
Gregory C. Black, Special
Counsel for the Commission

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[48] Not even the Commission can operate in violation of Federal Criminal Law. Nor can they suspend Petitioners basic Constitutional freedoms and rights guaranteed by the U.S. Constitution.

– What is more basic than the right to defend after being sued. (answering, counter-claiming and beginning discovery)?

– What is more basic than notice of what action is prohibited and what is not?

– What is more basic than a fair hearing and trial on ethical charges brought against an attorney?

– What is more basic than the right to defend in a civil action filed against one?

– What is more basic than the right to defend ones reputation, livelihood and family?